Supreme Court, U.S.
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No. 97-2018

In The
Supreme Court of the United States
October Term, 1997

THE KIOWA TRIBE OF OKLAHOMA,
Petitioner,

v.

ROBERT M. HOOVER, JR.,
Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Oklahoma

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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July 10, 1998

QUESTION PRESENTED FOR REVIEW

1. Should the Court shift to Congress the responsibility for undoing one of its creations?

2. Should Indian tribes join States and the United States of America in liability for payment of a debt?

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STATEMENT OF THE CASE

Robert M. Hoover, Jr. recovered a money judgment against The Kiowa Tribe of Oklahoma. This Brief in Opposition herein gives the Court an opportunity to rethink the error in the decision of May 26, 1998, *The Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, No. 96-1037, U.S.L.W. 4384, where the Court, in essence, held that a money judgment in a breach of an agreement in an off reservation, commercial transaction was void and that an earlier judgment against the Tribe was not res judicata; e.g. *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995) cert. denied, 517 U.S. 1188, 116 S.Ct. 1675, 134 L.Ed.2d 799 (1996).

REASONS FOR DENYING THE WRIT

INDIAN TRIBES MAY NOT INVOKE SOVEREIGN IMMUNITY IN ACTIONS TO APPLY NON-DISCRIMINATORY STATE LAW TO CONTRACTS INVOLVING ECONOMIC DEVELOPMENT OFF RESERVATION

Congress did not create the fiction of tribal sovereign immunity. Chief Justice Marshall created it in *Worchester v. Georgia*, (U.S.) 6 Pet. 515.

Mr. Justice Frankfurter had no trouble redefining it in *Organized Village of Kake v. Egan*, 369 U.S. 60, 7 L.Ed.2d 573, 82 S.Ct. 562.

This Court further defined governmental immunity in *United States, Petitioner v. Winstar Corporation, et al.*, 135 L.Ed.2d 964, 116 S.Ct. 2432, ____ U.S. ____.

The *Egan* case, supra, dealt with the power of the state (Alaska) to regulate off reservation fishing by Indians. Justice Frankfurter stated, in part:

> "As the United States spread westward, it became evident that there was no place where the Indians could be forever isolated. In recognition of this fact, the United States began to consider the Indians less as foreign nations and more as a part of our country . . . "

The general notion drawn from Chief Justice Marshall's opinion of *Worchester v. Georgia,* (U.S.) 6 Pet. 515, 561, 8 L.Ed 483, 501

> ". . . that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate, has yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations. By 1980, the Court no longer viewed reservations as distinct nations. On the contrary it was said that the reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by state law
> . . .
> The applicability of state law, theresaid, depends on "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them," 358 U.S., at 220 . . .
> But state regulation of off-reservation fishing certainly does not impinge on treaty-protected reservation self-government, the factor found decisive in *Williams v. Lee.*

This Honorable Court has reviewed the tradition of sovereignty and Mr. Justice Rhenquist found that no immunity for off-reservation activities had traditionally been recognized (concurring in part and dissenting in part, in *Washington v. Confederate Tribes of Colville Indian Reservation, et al.*, 447 U.S. 134, 65 L.Ed.2d 10, 100 S.Ct. 2069, citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 and *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129.)[1]

Santa Clara Pueblo, et al. v. Martinez, 436 U.S. 49, 56 L.Ed.2d 106, 98 S.Ct. 1670, is an uneven crutch. The majority acknowledged that while the tribes are "no longer 'possessed of all the full attributes of sovereignty' they remain a 'separate people, with the power of regulating their internal and social relation,' " citing *United States v. Wheeler*, 435 U.S. 313, 55 L.Ed.2d 303, 98 S.Ct. 1079, where at page 323, this Court states:

> "We have recently said 'Indian tribes are unique aggregations possessing attributes of sovereignty over both their **members** and their **territory** . . .' "(emphasis added)

Little note has been taken of the syllabus in *Martinez*, supra,

[1] Mr. Justice Rhenquist also concluded "When tradition did not recognize a sovereign immunity in favor of the Indians, this Court would recognize one only if Congress expressly conferred one". The theme of this Brief is that one cannot pronounce "We're Indian" and, ipso facto a fortiori, have sovereign immunity and be free from state laws and regulations.

> "Indian tribes are distinct, independent political communities retaining their original and natural right in matters of local, self-government: although **no longer possessed of the full attributes of sovereignty,** they remained a separate people, with the power of regulating the internal and social affairs". (emphasis added)

INDIAN TRIBES JOIN STATES AND THE UNITED STATES OF AMERICA IN LIABILITY FOR PAYMENT OF A DEBT

This Court, in *Winstar,* supra, said it succinctly in footnote 39, citing *United States v. Boswick,* 94 U.S. 53, (1867):

> "The United States, when they contract with their citizens, are controlled by the same laws that govern the citizens in that behalf;"

and in *Cooke v. United States,* 91 U.S. 389, 398, explaining that when the United States,

> "... comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there."

Confident that Justice Marshall did not intend to extend protection for Indian tribes beyond the reservation, Respondent moves that the Writ be denied. In the alternative, the opportunity exists for this Court to grant certiorari and deny any immunity for off-reservation commercial activities in which an Indian tribe elects to participate.

Respectfully submitted:

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